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**Committee on the Rights of Persons with Disabilities: General Discussion on Article 27**

**15 March 2021**

**Introduction**

1. The New Zealand Human Rights Commission (“the Commission”) welcomes the opportunity to make a submission to the Committee on the Rights of Persons with Disabilities (“the Committee”). The Commission is New Zealand’s National Human Rights Institution (“NHRI”). It is accredited as an “A” status NHRI. It is an independent Crown Entity pursuant to the Crown Entities Act 2004 and derives its statutory mandate from the Human Rights Act 1993 (“HRA”). The long title to the HRA states it is intended to provide better protection of human rights in New Zealand in general accordance with United Nations human rights covenants and conventions. In terms of disability rights, the Commission’s primary function is to “protect the full and equal enjoyment of persons with disabilities”.
2. The purpose of this submission is to provide input into the general discussion on Article 27 that the Committee is holding on 22 and 24 March 2021. We understand that the outcome of the discussion will inform the drafting of the Committee’s General Comment on Article 27. The Commission is happy for this submission to be published.
3. In light of recent litigation in New Zealand concerning the right of disabled persons to exercise legal capacity in employment relationships[[1]](#footnote-2), the Commission is providing a focused submission addressing the connection between the right to work and the right to exercise legal capacity under Article 12. In particular, we would like to highlight the issue of upholding legal capacity in employment relationships when there are questions relating to a disabled person’s ability to exercise their legal capacity due to a mental or intellectual impairment and a lack of a recognised (or mandated) supported decision making framework and resourcing.
4. The Commission has intervened in two separate cases in the last six months involving employment disputes arising from concerns relating to a disabled person’s legal capacity.[[2]](#footnote-3) Both cases are currently awaiting judgments from the Courts.
5. In the first case, *TUV v Defence Force of New Zealand*,[[3]](#footnote-4) the plaintiff alleged that she experienced stress, anxiety and depression due to workplace bullying and harassment. The Employment Court accepted that she was “more likely than not” mentally incapacitated when she signed a settlement agreement in which she forfeited her rights to advance a personal grievance claim against her employer. The issue on appeal centred on the validity of the employment agreement, considering the plaintiff’s diminished mental capacity at the time of signing the agreement. As intervener, the Commission highlighted the need to ensure that the plaintiff was able to exercise her legal capacity – through supported decision-making and appropriate safeguards.
6. In the second case, *Fleming v Attorney-General*[[4]](#footnote-5), the plaintiff acted as a caregiver to her intellectually disabled adult son. Under the new family care policy, in which family members previously excluded from being paid as carers could now be paid, the plaintiff’s son was required to employ his mother for her to access state funding as his caregiver.[[5]](#footnote-6) The issue in that case centred on the legitimacy of the employment agreement considering his high support needs relating to his intellectual disability, and the lack of support systems in place for him to exercise his legal capacity.
7. In both cases, at issue was the ability or otherwise of disabled persons to exercise their legal capacity in employment due to the general lack of specific supported decision-making mechanisms and safeguards available in the employment sector. Given the issues highlighted by the above two cases on the intersection of these rights, we set out below some of the international jurisprudence on Article 12 and its relevance to Article 27.

**State’s duty to provide support to disabled persons to exercise their legal capacity in employment**

1. Article 12.1 of the CRPD requires states parties to recognise all persons with disabilities as legal persons, capable of bearing rights and duties across all aspects of the law. Hence in General Comment No. 6 on equality and non-discrimination, the Committee describes the right to legal capacity as “a threshold right”, which is required to enjoy almost all the other rights in the CRPD.[[6]](#footnote-7) Article 12 thus starts from the position that a person with diminished mental or intellectual capacity has the right to exercise legal capacity in employment, must have access to support to do so, and should have their rights and interests protected via proportionate procedural safeguards.”[[7]](#footnote-8)
2. The CRPD Committee in General Comment No. 1 provides guidance on how to ensure access to supported decision-making and includes the following factors*:*[[8]](#footnote-9)
   1. It should be available to all, and a person requiring a high level of support should not be a barrier to obtaining supported decision-making
   2. All forms of support must be based on the will and preference of the person, not on what is perceived as being in his or her objective best interests
   3. States have an obligation to facilitate support
   4. States must ensure that support is available at nominal or no cost to disabled people
   5. Safeguards must be established for all processes relating to legal capacity and support in exercising legal capacity with the goal of safeguards being to ensure that the person’s will and preferences are respected
3. Supported decision making must therefore be available to disabled people throughout the employment process – from job applications at the point of entry, through to the redress of grievances at the exit. This duty to provide supported decision making at the point of redress of grievances at exit also engages Article 13(1) which obliges States Parties to:

*…ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”’*

1. Article 12(4) outlines safeguards that are necessary to ensure that the measures to support the exercise of legal capacity are free from abuse. The safeguards must ensure that:

*… measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are* ***proportional and tailored*** *to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. (emphasis added)*

1. The Special Rapporteur on the rights of persons with disabilities has stated that the primary purpose of the safeguards:[[9]](#footnote-10)

*must be to ensure the respect of the person’s rights, will and preferences. In order to accomplish this, the safeguards must provide protection from abuse on an* equal *basis with others.*

1. The requirement to ensure supported decision making and safeguards closely aligns with the right to participation, which is a core principle of the CRPD as set out at Article 3.3. Participation is has been described as a “cross-cutting issue” that “allows individuals to play a central role in their own development, as well as in the development of their communities.”[[10]](#footnote-11)Accessibility is essential to participation of disabled people and is described by the Special Rapporteur as a “precondition for persons with disabilities to fully participate in all aspects of life,”[[11]](#footnote-12) as articulated below: [[12]](#footnote-13)

*Without accessible information and communication, a range of persons with different disabilities cannot effectively participate in law-making and policymaking. This is particularly the case for persons with sensory and intellectual impairments.*

**Recommendations to the Committee regarding the State’s duty to provide support to disabled persons to exercise their legal capacity in employment**

1. In light of the issues highlighted in the cases described in paragraphs 5 and 6 above, the Commission makes the following recommendations to the Committee on the draft General Comment on Article 27:
   1. States parties should ensure that employment legislation provides for supported decision-making services throughout the pre-employment and employment relationship, including via the provision of alternative dispute resolution services.
   2. If it is established that a disabled person had entered into an agreement at any stage throughout the employment process without adequate support/safeguards to exercise full legal capacity – in the absence of adequate supported decision making and/or safeguards – the agreement should be set aside.

**Conclusion**

1. The Commission encourages the Committee to use the General Comment on Article 12 as an opportunity to build on the Draft General Comment for Article 27, by considering the linkage between the right to work and broader employment issues concerning legal capacity.

1. *TUV v The Chief of New Zealand Defence Force* SC CIV 14/2020, 8 September 2020; *Fleming v Attorney-General* [2020] NZEmpC 340, 18 December 2020. [↑](#footnote-ref-2)
2. Under s 5(2)(j) of the Human Rights Act 1993 (HRA), the Commission may apply to a court or tribunal to be appointed as intervener or as counsel assisting the court or tribunal if, in the Commission’s opinion, taking part in the proceedings in that way will facilitate the performance of its functions under s 5(2)(a): to be an advocate for human rights and to promote and protect, by education and publicity, respect for, and observance of, human rights. [↑](#footnote-ref-3)
3. Above n 1. [↑](#footnote-ref-4)
4. Above n 1. [↑](#footnote-ref-5)
5. In 2012, in *Ministry of Health v Atkinson* [2012] NZCA 184, the New Zealand Court of Appeal affirmed that the policy of not paying resident family members to provide disability support services to adult disabled family members constituted unjustifiable discrimination on the basis of family status. This led to the controversial Public Health and Disability Amendment Act 2013 (Part 4A) then allowed for payment to some family caregivers, but under strict conditions which required the disabled person to employ their caregiver. Part 4A was repealed in August 2020. Now family carers may be paid under the Individualised Funding model, which also requires a disabled person to employ their carer. [↑](#footnote-ref-6)
6. Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018 at [47]. General Comment No 1 on Article 12 defines legal capacity as including the capacity to be a ‘holder of rights’, entitling ‘the person to full protection of his or her rights by the legal system’, and the capacity to be ‘an actor under law’, recognised ‘as an agent with the power to engage in transactions’ and ‘in general to create, modify or end legal relationships’: Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) *Article 12: Equal Recognition before the Law* CRPD/C/GC/1, 19 May 2014, at [12]. [↑](#footnote-ref-7)
7. The Committee’s General Comment No 1 on article 12 makes this clear, providing that States Parties must “provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect, at [16]. [↑](#footnote-ref-8)
8. *Committee on the Rights of Persons with Disabilities, General comment No. 1 on Article 12: equal recognition before the law* UN Doc CRPD/C/GC/1 (19 May 2014) at [29]. [↑](#footnote-ref-9)
9. At [20]. [↑](#footnote-ref-10)
10. *Report of the Special Rapporteur on the rights of persons with disabilities* UN Doc A/HRC/31/62 (12 January 2016) at [13], [15]. [↑](#footnote-ref-11)
11. At [75]. [↑](#footnote-ref-12)
12. At [76]. [↑](#footnote-ref-13)